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Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF UTAH

THE ESTATE OF PAUL STEED, through its administratrix MARY KAZAN, Plaintiff/Appellant, -v- THE NEW ESCALANTE IRRIGATION CO., Defendant/Respondent.	PETITION FOR REHEARING Case No. 890426

APPEAL FROM JUDGMENT AND DECREE OF THE
SIXTH JUDICIAL DISTRICT COURT DATED 28 AUGUST 1989
JUDGE DON V. TIBBS

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UTAH

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The plaintiff (appellant here) respectfully petitions the Court for rehearing.

The present decision of the Court has overlooked authorities cited to the Court and misapprehends the state of current law. The decision adheres to an old line of cases which, for the most part, are factually inapposite and which were substantially modified by later decision of this Court. The decision misapprehends the import of those modifying decisions. The decision also overlooks other statements in treatises cited by the Court, which statements address the very problem presented by this case and suggest that the utilization of the new technology addressed in this case requires the need for further accommodation in the law rather than reliance on concepts suitable to a bygone era.

The "waste water" cases which make up the principal part of the reasoning in the present decision dealt for the most part with water running from one piece of land to an adjoining piece of land and involved the dispute of one farmer with another farmer. Those cases speak of "recapture." No farmer is here "recapturing" water at the end of his field. Those cases for the most part dealt with an immediate physical proximity and an immediate time frame. We deal here with water that does not simply run off or seep from the end of one field to another but with water that over a vast area of hundreds and hundreds of acres has seeped into the natural water table that slopes from the cliffs on the west to Alvey Wash on the east and becomes part of a natural water course which in turn is part of the Escalante River System. Though there is only one plaintiff here, the decision affects the water of other farmers on Alvey Wash and sets a dangerous precedent that will have adverse consequences throughout this State. We do in fact deal here with water that has commingled with the natural water table every bit as much and more as in Stubbs v. Ercanbrack, but the present decision in referring to Stubbs v. Ercanbrack fails to acknowledge that.

Moreover, we deal here with decreed water rights on a natural river system--water rights established for nearly a century--not just a claim asserted by an adjoining land owner. And these are rights recognized in a general adjudication proceeding to which the

defendant made not the slightest protest and with respect to which the pretrial order in this case and the defendant specifically acknowledge the decree in that proceeding as decreeing rights to this plaintiff. (Exhibit 77).

It is respectfully submitted that the present decision of the Court mispercieves the actual meaning of the McNaughton case and treats it simply as a "waste water" case, whereas the proper interpretation and application of that decision is as explained beginning at page 8 of the Plaintiff's Reply Brief.

The present decision of the Court acknowledges that East Bench Irrigation refused to adhere to the antiquated "waste water" cases and held that those decisions did not apply where the upper users' water returned to a natural system. The present decision restricts the meaning of East Bench to where the "water returned to the stream from which it was originally diverted." The language of that case, however, is not so restrictive. The case speaks of a "stream system," not merely the "stream" as this decision depicts it. "If such water after abandonment has re-entered a portion of the stream system from which it was originally appropriated . . . it becomes a part of that watercourse in legal contemplation as well as physically . . . ." (2 Utah 2d at 181, n. 6; 271 P.2d at 457, n. 6 (emphasis added) quoted at page 5 of the present decision.) Even one of the treatises cited in the present decision

(the 1942 edition of Hutchins quoted at page 5 of the present decision) states that "If such water after abandonment has re-entered a portion of the stream system from which it was originally appropriated . . . it becomes a part of that watercourse in legal contemplation as well as physically, and from the standpoint of rights of use, it is just as much a part of the flow as is the water with which it is mingled" and may be appropriated.

The distinction made in the present decision is artificial at best. It is not a distinction of substance and is not based on principle, as discussed at pages 3-5 of Plaintiff's Reply Brief. Decisions of such far reaching consequence as here involved should not be based on artificial concepts but should deal with realities. The fact that the water has for a century been returned to a tributary of the Escalante rather than directly to the Escalante should be of no consequence. Other courts have so acknowledged. In Mannix & Wilson v. Thresher, 26 P. 2d 373 (1933), the Montana court long ago held that a lower user's right to return flows transported from one stream to another in the same river system as a result of an upper user's appropriation is entitled to protection against changes in the upper user's manner of use. The artificiality of the distinction drawn in the present decision of this Court is shown by the example at page 4 of Plaintiff's Reply Brief. A decision as far reaching as the one here made must rely

on hydrological realities and not artificial barriers. The difference in ten feet or ten thousand feet on the same river system should make no difference. The ten feet or the greater distance on a tributary does not change the hydrological facts.

The enlightened decision of this Court in East Bench dealt with fundamental principles. The most fundamental concept of the law of this State is that all waters in this State, whether above or under the ground, are public waters. They are the property of the public. Beneficial use is the basis, the measure, and the limit of all rights to the use of water in this State. Even if one has acquired a water right, what water is not beneficially used belongs to the public. The water right of the defendant New Escalante Irrigation Company and its shareholders was and is so circumscribed. The defendant Irrigation Company's water right was not a totally consumptive right. The right which it acquired to use the water of this State was a right to take water from the Escalante System and to return part of that water to the system for the use of others on that system. It was a partially non-consumptive use. This Court in East Bench recognized this very principle in noting that in that case, as here in this case, it was clear "that a large percentage of such waters awarded to them [the irrigation company] have not been consumed by such use". The Court there recognized that

> The lower users have acquired a vested right to use all the unconsumed waters which would come down the stream to them under the use made of the water by the upper users and the conditions existing at the time they made their appropriations. The upper users cannot by a change in place of diversion or by a change in the place or nature of use consume more water than would have been consumed without the change and thereby deprive the lower users of their right to use such waters without impairing the rights of such lower users.

271 P. 2d at 454.

This concept that the "consumption" may not be changed was repeatedly emphasized by the Court. (271 p.2d at 456-459.) Yet the present decision permits the Irrigation Company to expand the partially non-consumptive use it acquired by its appropriation to a new and totally consumptive use.

The court in East Bench repeatedly referred to changes in the "manner" or "nature" of the use as being prohibited if it impaired the quantity of water reaching lower users. The decision was not restricted to a change in the type of use. It matters not that the defendant here is still using the water for irrigation; it has, nonetheless, changed the "manner" of so using the water. East Bench confirmed an expansive concept in the law of this State which is a necessary concept to balance the use of the waters of this arid State to the fair and beneficial use of all. Indeed, we are here committed by necessity to using waters "over and over again", to use the words of East Bench, and lower and even subsequent appropriators are and ought to be entitled to rely on the ability

to re-use water not previously placed to beneficial use when investing in their farms and wresting the land from wasted sagebrush. We have clearly here a change in the manner of use which without question impairs the rights of lower users who have relied on that water for decades.

Even if one were to still consider the water here involved as "waste" water rather than water commingled with the natural water table and water allowed to flow to a natural water course, the cases have recognized that even with "waste water" a subsequent user should be protected. The trend away from the rigid concepts applied in the present decision began to surface as early as 1921. In United States v Haga, 276 Fed. 41 at 46 (D. Idaho 1921), the court explained that where for 18 years a water company and its stockholders "had permitted the water to pass from their lands into a natural channel physically tributary to the stream from which it had been originally diverted, and to 'waste' in a very real sense," and the defendant lower user had made beneficial use of a part of that water "during all of which period the canal company continuously permitted the water to waste and manifested no intention to recapture or again to use it," the case was such that the canal company "must be held to have abandoned such right as it may have had" and could not reclaim the water "to the detriment of one who in good faith had appropriated it and was using it for

beneficial purposes." That case, though certainly not binding on this Court, is instructive to show a virtually identical situation where the water was not totally consumed and was returned to a tributary stream. There, an enlightened view of the law would not permit the lower user to be devastated.

The present decision acknowledges that it is undisputed that the sprinkler system is twenty-five percent more efficient than the prior flood irrigation system. There was extensive and uncontradicted expert testimony establishing this point. No one disputes that. Yet the decision appears to take off on the concept that the Irrigation Company is not now irrigating more acreage than it did prior to installation of the system. That can not be so--the twenty-five percent saved has gone someplace where it did not go before. No one can dispute that. We need not get into a calculation of the number of acres that the old appropriation rights might conceivably have allowed the Irrigation Company to irrigate. The point is that it obviously was not irrigating all of those acres under its prior manner of using the water in flood irrigating. Contrary to the inference in the present decision, no one has suggested that the new system "makes water," and it is not a matter of the "crops consuming more water." There is no evidence to that effect, and the suggestion is difficult to understand. The same crops have been planted since installation of the sprinkler

system as before. The fact is that the twenty-five percent of the water that once joined the natural water table and returned to the natural water course is now used to water acres not previously watered. It is irrelevant whether the water is being used to irrigate the 2712 acres decreed. All of those acres were not previously being watered. The twenty-five percent is not going down Alvey Wash; it is not being consumed by the plants. It is being used to water acres not previously watered. No reasonable mind can question that. It makes no difference that the acres may or may not be within "decreed" acres. Water not previously consumed by the defendant and which was beneficially used by the Alvey Wash users is now consumed by the defendant. That is the point, and there can be absolutely no argument about that.

The failure to file the change application should not be so easily disposed of as the present decision seems to do. The Court has misapprehended the legal point concerning the requirements of proof. If New Escalante had filed a change application as it was required by the statute to do, it would have been required to show--it would have been its burden to show--that its proposed change would not impair the rights of other users. It should not be permitted to avoid that requirement by simply ignoring the law by not filing the required change application. It should still have that burden here. It is a fundamental concept embedded in

Utah law and in its statutes that a change can not be made if it adversely affects others, and it is required that the party making the change sustain the burden of so showing. By written statement of the State Engineer's office responsible for administering this water, made in direct response to inquiry made by the defendant, the State Engineer's office would have required "that the flow from Alvey Wash must now be further supplemented from irrigation company shares." (See discussion at pages 21-22 of Plaintiff's Reply Brief.)

Lest there be any misunderstanding, no one is here trying to force the Irrigation Company defendant to continue to appropriate and transport water from the Escalante River. If it does not wish to do so, it can abandon its appropriation and the water will continue in the Escalante and the plaintiff and her fellow users on Alvey Wash or any others would be entitled to appropriate that water from the Escalante. But if the water is to continue to be used by the Irrigation Company under its prior appropriation, that appropriation is circumscribed by the conditions of use and the amount of water <u>consumed</u> as part of that appropriation over the last century. The present decision, in stating that "so long as New Escalante diverts only that volume of water to which it is entitled, it should be allowed to make the most efficient use of it" (page 9), improperly looks to diversion and not to beneficial

use as the measure of New Escalante's right. New Escalante's right, as discussed above, was a right that allowed for use of water by others, and although New Escalante and every other water user in this State has the right to improve efficiency, it may not do so to the extent that exercise of that right impairs the rights of others.

The present decision of the Court quotes at page 6 from a later edition of Beck et al, a treatise not cited in the briefs but referred to in oral argument, but the decision overlooks an important statement in the prior (1972) edition of that treatise which was quoted at argument. That statement points to the need for articulation of the proper application of the law that is here urged upon this Court. At page 80 of volume 5 of the 1972 edition of that treatise reference is made to the problems presented by the application of new technology. By the sentence at page 80 which reads, "The user may insist that because of new practices the duty of water is changed and therefore the irrigator may claim that he is entitled to expanded uses," the authors infer that such expanded uses ought not to be permitted. In discussing the amount of water beneficially consumed in irrigating practices, the authors (one of whom was counsel for the defendant in this case) acknowledged in that edition that "modern sprinkler-type irrigation" presents new

dimensions to old problems. (5 Beck et al, Water and Water Rights (1972), p. 80.) It is there acknowledged that

> The need for careful measurement and understandable rules is clear if better water allocation and water-saving practices which will not impair existing rights are to be encouraged. Conflicts in this area will probably increase and raise additional questions related to the duty of water, beneficial use, seasonal uses, and changes in places of diversion and use. (Id. p. 81. Emphasis added.)

There, citing an Arizona case, the authors state in a footnote that that case "emphasizes that the saved supply reverts to the public and is subject to appropriation" and that "in most areas the amount saved is theoretically available to supply prior appropriators who are receiving a short supply from an over-appropriated stream." Thus, that treatise and those authors recognized that the water saved by the use of new sprinkler technology should be utilized as the plaintiff here requests and as the State Engineer would have required had the defendant sought the permission for its change that our statutes require.[1]

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[1] The new edition with different authors does not appear to treat the impact of change in technology. In quoting from a different portion of the 1991 edition, the present decision does not consider all of the language quoted. That language includes the explanation that "the basic exception to allowing recapture is where the portion that would be subject to recapture has become return flow, that is finds its way back to its source. At that point, if not before, it becomes tributary water and subject to the call of the stream." We do indeed deal here with return flow. To say otherwise requires the adoption of the artificial distinction discussed above, and the law ought not to utilize a distinction like that.

We do not here attempt "to compel New Escalante to allow the water applied to irrigation to run off their shareholders' lands" as the present decision seems to perceive (page 10). That would indeed be contrary to sensible water policy. But we do request, just as the treatise just referred to suggests, that the amount of water saved by new technology should in part be utilized to supply those users whose supply has been reduced by the new technology.

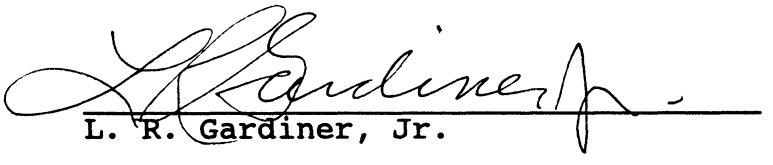
This case depends on fundamental principles, not on what one treatise or another may say in attempting to reconcile conflicting cases; nor does it depend on labels used in old cases. The Court today, in this era, should not be bound by "pigeonhole" classifications of yesteryear. New technology presents the opportunity for new thinking. The most fundamental principles of water law discussed at pages 5 and 6, above, must be applied to new situations without being stuck to old trappings of "waste water," "recapture," etc. Those trappings, which may be applicable on other facts, have nothing to do with this case. The fundamental principles underlying all water law should be looked to here to balance the rights of all. This case presents this Court with the opportunity to advance the modern concepts of East Bench and free itself from the confusing pigeonholes of the past.

This is not a case where there has to be one winner and one loser. This is not a case where hidebound concepts need cause a

win-lose situation either for the parties now before the Court or the myriad of water users in this State. The Court can here fashion, and has been requested to fashion, a decree that will at the same time encourage the use of new technology and yet protect other users. The evidence in this case is clear and undisputed that New Escalante can replace the loss suffered by the Steeds and all other users on Alvey Wash and still irrigate nearly twenty percent more acreage than it had been able to irrigate before the change to the pressurized sprinkler system. Modern law ought to accommodate modern technology and properly allocate the use of this scarce resource to all concerned and not force a straight jacket concept where other users of many decades are injured beyond repair.

Respectfully submitted.

GARDINER & HINTZE



L. R. Gardiner, Jr.

Attorneys for Plaintiff/Appellant

DATED: August 31, 1992.

CERTIFICATE OF GOOD FAITH
and
CERTIFICATE OF SERVICE

This Petition for Rehearing is presented in good faith and not for delay.

The foregoing Petition for Rehearing was served upon the defendant/respondent hereto by mailing a true and correct copy thereof this 31st day of August, 1992, to the following:

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